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No. 00-1775

Supreme Court, U.S.
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In The

# Supreme Court of the United States

A.J. ARAVE, Warden,

*Petitioner,*

v.

MAXWELL HOFFMAN,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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## ARGUMENT

### A. *Penry v. Johnson* Establishes The Existence Of Other Reasonable Interpretations Regarding Hoffman's Fifth And Sixth Amendment Claims

On June 5, 2001, eleven days after the state's petition for a writ of certiorari was filed, this Court issued *Penry v. Johnson*, 121 S.Ct. 1910 (2001), a capital case reaffirming the narrowness of this Court's holding in *Estelle v. Smith*, 451 U.S. 454 (1981). While Hoffman references *Penry* by claiming the Ninth Circuit's opinion is allegedly consistent with the holding in *Penry*, Hoffman never discusses the relevance of *Penry* to his case.

In *Penry*, this Court concluded, "The differences between this case and *Estelle* are substantial, and our opinion in *Estelle* suggested that our holding was limited to the 'distinct circumstances' presented there." *Penry*, 121 S.Ct. at 1919. This Court acknowledged it has "never extended *Estelle's* Fifth Amendment holding beyond its particular facts." *Id.* Because this Court recognized the narrowness of *Estelle*, it concluded it was not "objectively unreasonable for the Texas court to conclude that Penry is not entitled to relief on his Fifth Amendment claim." *Id.*

Clearly, the Ninth Circuit's opinion extending Fifth and Sixth Amendment protections to routine presentence interviews in capital cases conflicts with *Penry*. As noted in the state's petition, and now recognized by this Court, because there are other reasonable interpretations of *Estelle*, the Ninth Circuit's expansion of *Estelle* created a new rule in violation of *Teague v. Lane*, 489 U.S. 288 (1989).

### B. Idaho's Statutory Scheme Involving Presentence Interviews And Reports In Capital Cases Is Not Unique

Hoffman implies that because the death penalty is involved, his presentence interview is not "routine." While the state acknowledges the difference between death and prison sentences, the penalty does not change the nature of the presentence interview. Contrary to Hoffman's claim, there is nothing "unique" in Idaho's statutory capital sentencing scheme that differentiates it from any jurisdiction that has addressed the question of whether Fifth or Sixth Amendment protections are extended to presentence interviews.

In Idaho, Idaho Criminal Rule 32 governs the content of all presentence interviews and reports, irrespective of the penalty; there is no separate rule or statute that governs presentence interviews and reports in capital cases. While Idaho Criminal Rule 33.1 mandates a presentence investigation in all capital cases, the investigation is still limited to the dictates of Idaho Criminal Rule 32. The presentence interview and report are limited to the following:

> (1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and the defendant's explanation for the act, the arresting officer's version or report of the offense, where available, and the victim's version, where relevant to the sentencing decision.
>
> (2) Any prior criminal record of the defendant.

(3) The defendant's social history, including family relationships, marital status, age, interests and activities.

(4) The defendant's educational background.

(5) The defendant's employment background, including any military record, and defendant's present employment status and capabilities.

(6) Residence history of the defendant.

(7) Financial status of defendant.

(8) Health of defendant.

(9) The defendant's sense of values and outlook on life in general.

(10) The presentence investigator's analysis of the defendant's condition. That analysis of the defendant's condition contained in the presentence report should include a complete summary of the presentence investigator's view of the psychological factors surrounding the commission of the crime or regarding the defendant individually which the investigator discovers. Where appropriate, the analysis should also include a specific recommendation regarding a psychological examination and plan of rehabilitation.

Idaho Criminal Rule 32(b)(1-10).

Capital presentence interviews in Idaho are analogous to those described in *Baumann v. United States*, 692 F.2d 565 (9th Cir. 1982). In Idaho, there is no bifurcated jury proceeding; the death penalty is imposed by the trial court without input from a jury. Hoffman's presentence

report and interview, required by Idaho Criminal Rule 33.1, were "routine," without attempting to elicit evidence relating to any critical aggravating factor. Pursuant to Idaho Criminal Rule 32, the report reviewed the police investigation, Hoffman's prior criminal history, social history and his interview regarding the murder. *See* Appendix B, Brief in Opposition. The only statement not presented in open court was the investigator's recommendation, which was not binding on the trial court. *State v. Ramirez*, 824 P.2d 894 (Idaho Ct. App. 1991).

While Hoffman claims Idaho's statutory scheme for capital sentencing and completion of a presentence interview and report is "unique," he has failed to list a single jurisdiction that has a different procedure for the completion of a presentence interview and report in capital cases. Other states certainly mandate the completion of a presentence interview and report prior to the finding of aggravating circumstances or sentencing. Because of the necessity of providing the defendant an opportunity to respond to the contents of a presentence report prior to sentencing, logic dictates the interview and report must be completed prior to sentencing. Even Federal Rule of Criminal Procedure 32(b)(4), which governs the content of presentence reports in federal cases, is similar to Idaho Criminal Rule 32(b). Likewise, Federal Rule of Criminal Procedure 32(c)(3) mandates that the presentence interview and report be completed prior to sentencing.

### C. The Ninth Circuit's Opinion Raises Important Constitutional Questions Affecting Numerous Capital Cases And Certiorari Should Not Be Denied Merely Because The State Has Not Challenged The Ninth Circuit's Decision To Remand This Case For An Evidentiary Hearing

The state has acknowledged the Ninth Circuit's granting of an evidentiary hearing on claims of ineffective assistance of counsel. *Hoffman v. Arave*, 236 F.3d 523, 536 (9th Cir. 2001). However, contrary to Hoffman's claim, those issues are not "uncontested" by the state. Based upon his logic, Hoffman would have this Court deny a state's petition for certiorari any time a case has been remanded for trial because of the possibility of the defendant's acquittal.

Contrary to Hoffman's claim, the Ninth Circuit's opinion affects more than a "few jurisdictions." Despite Hoffman's implied claim that other jurisdictions have extended Fifth and Sixth Amendment protections to routine presentence interviews, he has failed to cite a single case to support his claim.

Based upon the Ninth Circuit's expansion of *Estelle*, numerous capital defendants may have to be resentenced if their attorney was not present during the presentence interview. Such a result conflicts with this Court's opinion in *Penry*, all other circuits and multiple states that have addressed the question of whether an expansion of *Estelle* to presentence interviews is necessitated by the Constitution. Based upon this conflict and the important

nature of the question, the state requests that a writ of certiorari issue.

## CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue and that the judgment of the Ninth Circuit Court of Appeals be reversed with regard to Hoffman's routine presentence interview.

Respectfully submitted,

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